The Independent Contractor-Employee Dilemma and Other Issues Concerning the Alleged Misclassification of Employees

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1. NATIONAL LABOR RELATIONS BOARD UPDATE CONCERNING INDEPENDENT CONTRACTOR CASES

a. NLRB Standard on Independent Contractors


1. The term “employee” specifically excludes “any individual having the status of an independent contractor”. Id. at § 152(3).


1. the control that the employing entity exercises over the details of the work;

2. whether the individual is engaged in a distinct occupation or work;

3. the kind of occupation, including whether, in the locality in question, the work is usually done under the employer's direction or by a specialist without supervision;

4. the skill required in the particular occupation;
5. whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work;

6. the length of time the individual is employed;

7. the method of payment, whether by the time or by the job;
8. whether the work in question is part of the employer's regular business;

9. whether the parties believe they are creating an employment relationship; and

10. whether the principal is in the business.


b. The D.C. Circuit’s Entrepreneurial Opportunity Test

i. In Fed Ex. Home Delivery v. NLRB, 563 F.3d 492 (D.C. Cir. 2009), two of three judges of the D.C. Circuit purported to amend the common law test of agency by “shift[ing the] emphasis away from the unwieldy control inquiry in favor of a more accurate proxy: whether the putative independent contractors have significant entrepreneurial opportunity for gain or loss.” (Internal citations and quotations omitted).

ii. Test Includes the Following Factors:

1. Contract states that manner and means of reaching mutual business objectives within contractor’s discretion.

2. Employer may not prescribe hours of work, whether or when the contractors take breaks, what routes they follow, or other details of performance.

3. Drivers are not subject to reprimands or other discipline.

4. Drivers must provide their own vehicles, although the vehicles must be compliant with government regulations and other safety requirements.
5. Drivers are responsible for all the costs associated with operating and maintaining their vehicles.

6. Drivers may use the vehicles “for other commercial or personal purposes ... so long as they remove or mask all FedEx Home logos and markings.”

7. Drivers can independently incorporate.

8. Drivers can and have negotiated with FedEx for higher fees.

9. Drivers may contract to serve multiple routes or hire their own employees for their single routes. This ability to hire “others to do the Company’s work” is no small thing in evaluating “entrepreneurial opportunity.”

10. Drivers can assign at law their contractual rights to their routes, without Employer’s permission. (This aspect of the Operating Agreement is “significant”).

c. NLRB Position on Entrepreneurial Opportunity

i. Pre-Fed Ex. Home Delivery case law

1. The opportunity for entrepreneurial gain or loss must be “significant” to constitute an indicium of independent contractor status. Corporate Express Delivery, 332 NLRB 1522, 1522 (2000), enforced, Corporate Express Delivery Systems v. NLRB, 292 F.3d 777 (D.C. Cir. 2002).

ii. Post-Fed Ex. Home Delivery litigation


   a. Region 27’s Regional Director rejected the Employer’s claim that the D.C. Circuit adopted a “new test” in Fed Ex. Home Delivery, finding instead that the Court specifically stated that it analyzed all of the common law factors.

   b. Regional Director instead used traditional Restatement test and found that SuperShuttle drivers were employees under NLRA.
c. Employer’s request for review rejected by NLRB.
   (May 5, 2010).

d. Case likely to ultimately be appealed to D.C. Circuit.

   
a. Region 1 Regional Director used traditional Restatement test to find musicians were employees under the NLRA.

   b. Cited but distinguished *FedEx Home Delivery* on grounds that “musicians’ risk of entrepreneurial loss or opportunity for gain is too minimal to confer independent contractor status.” *Id.* at *13.

2. **CLASS CERTIFICATION AND MERITS-BASED DECISIONS IN RECENT CASES ALLEGING INDEPENDENT CONTRACTOR MISCLASSIFICATION**

   a. Class certification decisions regarding alleged misclassification of employees as independent contractors are a mixed bag. Recent and noteworthy decisions include the following:

   i. *Ruiz v. Affinity Logistics Corp.*, 2009 WL 648973 (S.D. Cal. Jan. 29, 2009) (granting class certification on lone issue of whether defendant should have classified delivery drivers as employees rather than independent contractors, but denying certification on plaintiff’s remaining claims because trial of the claims would require individual inquiries as to whether absent class members actually received the benefits at issue).

iii. *Smith v. Cardinal Logistics Mgmt. Corp.*, 2008 WL 4156364 (N.D. Cal. Sep. 5, 2008) (granting certification to proposed class specifically excluding drivers who hired other drivers to drive their routes because common issue of whether the employer misclassified its drivers predominated over any individual questions and class action would be superior method for resolution of the litigation).

iv. *Walker v. Bankers Life & Cas. Co.*, 2008 WL 2883614 (N.D. Ill. July 28, 2008) (granting motion to decertify class in action alleging misclassification of insurance agents as independent contractors where full discovery record revealed that common questions would not predominate over individual ones and class action device was not a superior method for adjudication).

v. *In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 2008 WL 7764456 (N.D. Ind. Mar. 25, 2008) (granting class certification in cases involving delivery drivers from Tennessee, Arkansas, Kentucky, Texas, Wisconsin, Alabama, New York, New Jersey, Maryland, Minnesota, Pennsylvania, New Hampshire, South Carolina, Oregon, Indiana, West Virginia, Florida, and Rhode Island; granting certification to California class and sub-class for state law claims but denying with respect to Family and Medical Leave Act claims; and denying class certification in cases involving drivers from Montana, Mississippi, Massachusetts, Michigan, Missouri, South Dakota, Iowa, Virginia, and Illinois).

vi. *In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 2007 WL 3027405 (N.D. Ind. Oct. 15, 2007) (granting certification for Kansas Wage Payment Act claim, common law claims, and ERISA class where class action was found to be superior and common questions of law and fact predominated over individual issues).


ix. *Ali v. U.S.A. Cab Ltd.*, 176 Cal. App. 4th 1333 (2009) (affirming trial court’s denial of class certification because common factual issues did not predominate and class treatment was not superior to separate lawsuits in case alleging misclassification of taxi cab drivers).

b. Merits-based decisions also are a mixed bag. Recent and noteworthy merits decisions include the following:

i. *Ernster v. Luxco, Inc.*, 596 F.3d 1000 (8th Cir. 2010) (affirming jury verdict finding that marketing representative alleging age discrimination in violation of the Age Discrimination in Employment Act and Iowa Civil Rights Act was an independent contractor rather than an employee).

ii. *Narayan v. EGL, Inc.*, 2010 U.S. App. LEXIS 14279 (9th Cir. July 13, 2010) (reversing district court order granting defendant’s motion for summary judgment, and finding that California, not Texas, law applied and under California’s multi-faceted test of employment, there existed at the very least sufficient indicia of an employment relationship between the plaintiff delivery drivers and defendant logistics company that a reasonable jury could find the existence of such a relationship).

iii. *FedEx Home Delivery v. National Labor Relations Bd.*, 563 F.3d 492 (D.C. Cir. 2009) (holding that delivery drivers were independent contractors rather than employees under the National Labor Relations Act where common law factors favored independent contractor status and indicia favoring a finding that drivers were employees were clearly outweighed by evidence of entrepreneurial opportunity).

iv. *Estate of Suskovich v. Anthem Health Plans of Va., Inc.*, 553 F.3d 559 (7th Cir. 2009) (affirming district court’s grant of summary judgment to defendants finding computer programmer was an independent contractor rather than an employee).

v. *Hopkins v. Cornerstone America*, 545 F.3d 338 (5th Cir. 2008) (finding insurance sales leaders were employees under the FLSA, not independent contractors, as a matter of economic reality).

vii. *Corp. Express Delivery Sys. v. National Labor Relations Bd.*, 292 F.3d 777 (D.C. Cir. 2002) (upholding NLRB’s decision that plaintiffs were employees and agreeing that “entrepreneurial opportunity” better captured the distinction between an employee and an independent contractor than did employer’s control of means and manner of work).

viii. *Ruiz v. Affinity Logistics Corp.*, 2010 WL 1038226 (S.D. Cal. Mar. 22, 2010) (judgment for defendant after bench trial; drivers were properly classified as independent contractors under Georgia law where employment agreement raised independent contractor presumption, drivers were not required to perform the contracted-for work themselves, drivers established their own business prior to working for defendant, and defendant did not control drivers’ hours, tools, procedures, or manner and method of work to extent necessary to establish employer-employee relationship; common law factors also weighed in favor of independent contractor relationship).


x. *RPHS, Inc. v. Assessment Bd. for the Oklahoma Employment Security Commission*, 197 P.3d 516 (Okla. App. 2008) (finding relief pharmacists were independent contractors of placement firm where, among other things, clients, not placement firm, directed work or details and pharmacists could accept or reject offered position, paid own taxes, and provided equipment, supplies, transportation, and license at own expense).

3. **RECENT DEVELOPMENTS IN FLSA WHITE COLLAR EXEMPTIONS**

a. **FLSA White Collar Exemptions Overview**

   i. The term “white collar exemptions” includes the executive, administrative, professional, and outside salesperson exemptions. Employers continue to face difficulty in applying these exemptions to particular jobs, resulting in continuing litigation over their meaning and scope.

   ii. To fall under the white collar exemptions (except for the outside salesperson exemption), an employee must satisfy the salary basis
test (see 29 CFR §§ 541.602, 603) and the primary duty test (employee’s primary duty is exempt work, and in the case of outside salespersons, employee spends sufficient time away from the employer’s place of business performing exempt work), among other requirements. See generally E. Kearns, *The Fair Labor Standards Act* (BNA 2002) at 171. This outline highlights recent cases interpreting these requirements over the past year.

b. Recent Salary Basis Test Cases

i. Salary Basis Test: Employee must receive a predetermined, fixed compensation at a rate of not less than $455 per week on a regular basis that is not subject to reductions due to variations in quality or quantity of work. 29 C.F.R. § 541.602(a).

ii. *Baden-Winterwood v. Life Time Fitness, Inc.*, 566 F.3d 618 (6th Cir. 2009) (employer’s bonus plan that allowed it to recover portions of bonus payments for poor performance through base salary deductions violated the salary basis test).


viii. State law note: California’s wage and hour law enforcement agency issued an opinion letter opining that a reduction in the work schedule and salaries of exempt employees due to an employer’s economic difficulties does not violate California law so long as the employees continue to meet the salary basis test and satisfy the
duties test for the applicable exemption. Division of Labor Standards Enforcement (“DLSE”) Opinion Letter 2009.08.19. Another DLSE opinion letter opines that an employer may make full day deductions from an exempt employee’s pay without the employee losing exempt status when the employee is absent from work for one or more full days for personal reasons other than sickness or disability, or due to sickness or disability if the deduction is made from a bona fide policy of compensation for such sickness or disability. DLSE Opinion Letter 2009.11.23. The letter also opines that the employer may deduct absences due to vacation or sickness of less than a full day from leave time balances under a bona fide plan providing leaves without the employee losing exempt status.

c. Recent Executive Exemption Cases

i. Executive Exemption Duties Test: Employee’s primary duty is management of the enterprise of a recognized department or subdivision of the establishment; employee customarily and regularly directs the work of two or more employees; and employee has the authority to hire or fire other employees, or his or her recommendations on hiring, firing, promotion, or other status changes are given particular weight. 29 C.F.R. §541.100.


iii. Barreto v. Davie Marketplace, LLC, 331 Fed. Appx. 672 (11th Cir. 2009) (summary judgment motion against plaintiff denied where he testified to performing significant non-exempt work due to understaffing of his department at grocery store).

iv. Hale v. Dolgencorp, Inc., 2010 WL 2595313 (W.D.Va. June 23, 2010) (reasonable jury could conclude that store manager’s primary duty was not management where she spent forty percent of her time in the store alone supervising no one and performing the tasks typically done by a clerk and spent a significant amount of the rest of the time performing menial tasks).

v. Johnson v. DG Retail LLC, 2010 WL 1929620 (D. Utah May 13, 2010) (store manager exempt even where she spent only 20-30% of her time performing managerial duties because she was the only employee in charge of the day-to-day operations of the store, performed her job with relatively little supervision, and earned significantly more than other employees at the store).
vi. *Johnson v. Big Lots Stores, Inc.*, 604 F.Supp.2d 903 (E.D. La. April 2, 2009) (plaintiffs’ managerial duties were to infrequent and inadequately discretionary to fall within the exemption).

vii. *Clougher, supra* (summary judgment motion against plaintiff denied where factual record showed disputed facts about how much time plaintiff spent on managerial duties).

d. Recent Administrative Exemption Cases and Developments

i. Administrative Exemption Duties Test: Employee’s primary duty is performance of office and non-manual work directly related to the management or general business operations of the employer or its customers, and includes the exercise of discretion and independent judgment on matters of significance. 29 C.F.R. § 541.200(a).

ii. Financial Industry Employees

1. *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529 (2d Cir. 2009), cert. denied, 130 S. Ct. 2416 (heavily relying on the “administrative/production dichotomy, court holds that underwriter whose primary duty was to sell loan products following detailed credit guide directions was not involved in setting management policies or the general business operations, but rather on the “production” of the bank’s primary financial service, loans).


3. *In re RBC Dain Rauscher Overtime Litigation, supra* (employer not entitled to summary judgment on administrative exemption because genuine issues of material fact existed as to whether security brokers’ primary duty was sales as opposed to advice to clients affecting their management or general business operations).

5. State law note: Two cases which relied heavily on the “administration/production dichotomy” test are pending before the California Supreme Court. See Harris v. Superior Court, 154 Cal.App.4th 164, review granted, 68 Cal.Rptr.3d 528 (2007) (court of appeal held that claims adjusters did not fall under the administrative exemption because their job duties fell on the production side of the administrative/production worker dichotomy); Pellegrino v. Robert Half International, Inc., 182 Cal.App.4th 87, review granted, S180849 (2010) (court of appeal held that account executives who recruited potential temporary employees and placed them with customers were engaged in sales work that was not directly related to the management policies of the defendant).

iii. Pharmaceutical Representatives

1. In re Novartis Wage and Hour Litigation, -- F.3d --, 2010 WL 2667337 (2d Cir. July 6, 2010) (representatives do not exercise sufficient discretion and independent judgment on matters of significance: they have no authority to formulate management policies, are not involved in planning company’s business objectives, do not carry out major assignments in conducting the operations of company’s business, and do not have the authority to commit company in matters with significant financial impact; the “four freedoms” (freedom to decide how to arrange visit schedule, freedom to decide how to access physician’s offices, freedom to decide how to allocate budgets for promotional events, and freedom to determine how to allocate their samples) do not show that representatives exercised sufficient discretion or independent judgment).

2. Smith v. Johnson & Johnson, 593 F.3d 280 (3d Cir. 2010) (pharmaceutical representative properly classified under the administrative exemption because her deposition testimony showed she formed a strategic plan to maximize sales and executed nearly all of her duties without oversight; court would not consider her alleged inflation of job duties “mere puffery”).

employer’s techniques and procedures; unlike Smith, they did not engage in sales calls independently and were not free from immediate direction).

4. Schaefer-LaRose v. Eli Lilly & Co., 2009 WL 3242111 (S.D. Ill. Sept. 29, 2009) (pharmaceutical representative was on the administration side of the “production/administration dichotomy”; her duties were directly related to the general business operations of the company because her success in obtaining increased levels of prescriptions was a critical part of the company’s business; she exercised discretion and independent judgment by tailoring her marketing presentation to each physician, adjusting her approach in response to prescription level reports; and deciding how to allocate drug samples and meals with physicians).

5. State law note: The Ninth Circuit issued an order certifying a question regarding the applicability of California law’s administrative exemption to pharmaceutical sales representatives for the California Supreme Court to resolve (D’Este v. Bayer Corp., 565 F. 3d 1119, 1121 (9th Cir. 2009)); however, the state high court declined to answer this question.

iv. Reiseck v. Universal Communications of Miami, Inc., 591 F.3d 101 (2d Cir. 2010) (advertising salesperson is non-exempt because she sold specific advertising space to clients and not to market or promote sales generally).

v. Desmond v. PNGI Charles Town Gaming LLC, 564 F.3d 688 (4th Cir. 2009) (racing official position that race track was required to have under state law was not exempt because racing officials performed a production role unrelated to the general business operations of the race track).

vi. Hines v. Longwood Events, Inc., 2010 WL 2573194 (D. Mass. June 23, 2010) (sales managers for event venues were exempt because they not only sold venues but assessed individual client needs and worked with customers to design customized events based on those needs, which affected the company’s business operations; they also exercised discretion and independent judgment in determining how to assemble an event to suit each client’s preferences).

because his duties included making recommendations regarding coverage of claims and litigation).

viii. *Andrade v. Aerotek, Inc.*, -- F.Supp.2d --, 2010 WL 1244308 (D. Md. Mar. 30, 2010) (recruiter who found and placed financial services professionals in contract positions was exempt because her work was directly related to the company’s business operations and she exercised discretion and independent judgment by selecting candidates to be sent to the client’s hiring manager for approval based on her assessment of their fit with the candidates and by negotiating pay for the candidates).

ix. *Beamer v. Possum Valley Municipal Authority*, 2010 WL 1253476 (M.D. Pa. Mar. 24, 2010) (plant manager of municipal sewage treatment plant was exempt because, in addition to non-exempt testing and lab work, he performed significant personnel management, human resource, and complaint handling duties that were critical to the plant’s operations, and he exercised discretion and independent judgment as the most senior official running the daily operations of the plant).

x. *Fenton v. Farmers Insurance Exchange*, 663 F.Supp.2d 718 (D. Minn. 2009) (insurance investigators whose primary role is to gather facts and present them to claims representatives to analyze for coverage and settlement negotiations are non-exempt).

e. Recent Learned Professional Exemption Cases

i. Professional Exemption Duties Test: Employee’s primary duty must be performing work that requires advanced knowledge in a field of science or learning that is customarily acquired by a prolonged course of intellectual instruction. 29 C.F.R. § 541.301(a).

ii. *Pignataro v. Port Authority of New York and New Jersey*, 593 F.3d 265 (3d Cir. 2010) (helicopter pilots are not exempt professionals because their work does not require advanced knowledge customarily acquired from a prolonged course of specialized instruction; their knowledge and skills were acquired through experience and supervised training).

iii. *Mudgett v. University of Pittsburg Medical Center*, 2010 WL 1838413 (W.D. Pa. May 6, 2010) (clinical coordinator is exempt professional because she had a nursing degree, she was a registered nurse, and she was given authority by physicians to treat their patients under certain circumstances).
iv. *Solis v. Washington*, 2010 WL 1692215 (W.D. Wash. Apr. 26, 2010) (state social worker educational requirement of degree or thirty semester hours in counseling, psychology, social work, or human services plus eighteen months of social work experience and one year of on-the-job training satisfies the prolonged course of intellectual instruction requirement; DOL’s litigation position not entitled to deference).

v. *In re RBC Dain Rauscher Overtime Litigation, supra* (employer failed to show as a matter of law that securities broker required to have a Series 7 license is a profession requiring specialized academic training because specialized knowledge for Series 7 license does not require a prolonged course of intellectual instruction).


vii. State law note: In *Campbell v. PricewaterhouseCoopers LLP*, 602 F. Supp. 2d 1163 (E.D. Cal. 2009), a federal district court applying California law held that unlicensed employees primarily engaged in accounting do not fall within the professional exemption. The case is currently being reviewed by the Ninth Circuit.

f. Recent Computer Professional Case: *Clarke v. JPMorgan Chase Bank, N.A.*, 2010 WL 1379778 (S.D.N.Y. Mar. 26, 2010) (information technology employee fell under the computer employee exemption because he was primarily engaged in the exempt duties listed in 29 U.S.C. § 213(a)(17) and he did not perform the non-exempt functions listed in 29 C.F.R. § 541.401; cases interpreting the former computer professional exemption are not persuasive because the new computer employee exemption is broader).

g. Recent Outside Salesperson Cases

i. Outside Sales Exemption Test: Employee’s primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which consideration is paid by the customer; employee is customarily and regularly engaged away from the employer’s place of business. 29 C.F.R. § 541.500.

ii. Pharmaceutical representative cases
1. Compare In re Novartis, supra (representatives’ promotional work does not constitute sales work, showing deference to the DOL’s interpretation of the regulations); Jirak, supra (court agrees with DOL interpretation that pharmaceutical representatives are not outside salespersons because promotional activities designed to increase sales made by someone else is not exempt outside sales work); and Kuzinski v. Schering Corp., 604 F.Supp.2d 385 (D. Conn. 2009) (representatives did not qualify for the exemption because they did not make sales or obtain orders or contracts to sell pharmaceuticals) with Schaefer-LaRose, supra (although pharmaceutical representatives do not make direct sales, they represent a special category because they drive up demand for those sales from physicians, who are the only ones who can legally purchase medication).

2. State law note: The Ninth Circuit issued an order certifying a question regarding the applicability of California law’s outside salesperson exemption to pharmaceutical sales representatives for the California Supreme Court to resolve (D’Este v. Bayer Corp., 565 F.3d 1119, 1121 (9th Cir. 2009)); however, the state high court declined to answer this question.

iii. Schmidt v. Eagle Waste & Recycling, Inc., 599 F.3d 626 (7th Cir. 2010) (district court decision finding account representative exempt upheld because plaintiff’s primary duty was outside sales work and even if she didn’t qualify for that exemption alone she would have fallen under the “combination exemption” because her other duties were exempt administrative duties, such as negotiating with clients, developing marketing plans, managing customer complaints, and filling in for the company president).

iv. Gregory v. First Title of America, Inc., 555 F.3d 1300 (11th Cir. 2009) (insurer’s “marketing executive” made sales and thus was an exempt outside salesperson because “[o]nce an order for title insurance services is obtained [by the plaintiff], the sale is complete”).

v. Krohn v. David Powers Homes, Inc., 2009 WL 1883989 (S.D. Tex. June 30, 2009) (salesperson for home builder was not exempt because, contrary to the expectations of her employer, she actually worked mainly inside the office and delegated her outside sales tasks to other staff; however, plaintiff failed to show that she worked overtime in any particularly work week).
4. **PENDING LEGISLATION**


   i. Amends the FLSA to require creation and retention of records regarding identity of independent contractors and employees and notice to independent contractors and employees of their right to be properly classified under federal labor laws. Provides for civil penalties for violations.

b. **Taxpayer Responsibility, Accountability, and Consistency Act of 2009**, S.2882 (Sen. John Kerry) & H.3408 (Rep. McDermott): amends the Safe Harbor provisions (Section 530) of the Revenue Act of 1978 (P.L. 95-600) which denies the IRS the ability to reclassify workers and obtain back employment taxes under certain circumstances to make the requirements more restrictive and to require yearly reporting by the Secretary of the Treasury on worker misclassification. Increases certain penalties for reporting violations.

c. **2011 Presidential Budget** has two related proposals:

   i. To revise the Safe Harbor Provisions to the Revenue Act to permit prospective reclassification of those found to be misclassified as independent contractors (see www.treas.gov/offices/tax-policy/library/greenbk10.pdf at pp. 107-109); and

   ii. To provide additional Department of Labor budget of $25 million for “Misclassification Initiative” to combat employee misclassification (EL360 2/1/10) – targeted at misclassification as independent contractors – DOL plans to hire 100 additional enforcement personnel and provide grants to states to give them an incentive to address the resulting deprivation of entitlement to workers’ compensation, unemployment and other rights.